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## AVIATION LAW: ATTEMPTS TO CIRCUMVENT THE LIMITATIONS OF LIABILITY IMPOSED ON INJURED PASSENGERS BY THE WARSAW CONVENTION

It is generally recognized, both in the legal community and in the public sector, that the amount of recoveries in personal injury and wrongful death actions has been rising. In one area of aviation law, however, this trend has been conspicuously absent. The Warsaw Convention<sup>1</sup> places an absolute limit on the amount of recoveries for injuries or death incurred while the plaintiff was a passenger on an international flight.

As might be expected, the treaty has borne the brunt of both frontal and flanking attacks by ingenious plaintiffs' attorneys. The Warsaw Convention stands today as a brick wall in the path of increasing recoveries for injuries and deaths. This article will focus on the many attempts to avoid the limitation of liability afforded airlines by the Warsaw Convention and will analyze why they have failed. It will also discuss whether any nonpolitical attempt to alter the limits will be successful.<sup>2</sup>

### THE TREATY

The Warsaw Convention was enacted in 1929.<sup>3</sup> Its purpose was to limit potential liability for aviation accidents in order to promote the rapid growth of international air travel.<sup>4</sup> It was felt by the delegates that a low limit of liability would enable the airline industry to grow without the burden of large lawsuits or equally large insurance premiums.<sup>5</sup> The Warsaw Convention limits airline liability for passengers' injuries or death to approximately \$8,300.<sup>6</sup> In order to justify this

1. The Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, T.S. No. 876, 49 Stat. 3000 (1934) [hereinafter referred to in text and footnotes as the Warsaw Convention or the Convention].

2. A broad overview of this area will be presented to the reader in this article. For an in-depth analysis of specific problems, citations will be given to detailed sources.

3. 1 L. KREINDLER, AVIATION ACCIDENT LAW § 11.01[2] (rev. ed. 1977) [hereinafter cited as KREINDLER].

4. *Id.*

5. See Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 499-500 (1967) [hereinafter cited as Lowenfeld & Mendelsohn].

6. The actual amount of recovery is limited by article 22(1) to 125,000 Poincaré francs, which was equivalent to \$8,292 at the time of the signing of the convention. KREINDLER, *supra* note 3, at § 12.02[1].

rather low limitation of liability, the Warsaw Convention also created a presumption of liability against the airlines.<sup>7</sup> This presumption can be overcome in only three circumstances: if the carrier has taken all possible measures to prevent, or if it was impossible to prevent the accident;<sup>8</sup> if the passenger was contributorily negligent;<sup>9</sup> or if the carrier was guilty of "wilful misconduct."<sup>10</sup> The Warsaw Convention also imposed a two-year statute of limitations on any action brought under its terms.<sup>11</sup>

The United States became a signatory of the Convention on October 29, 1934.<sup>12</sup> The Warsaw Convention supersedes domestic law in this area by virtue of its being a treaty of the United States.<sup>13</sup>

The Warsaw Convention has been ratified by ninety-eight countries.<sup>14</sup> These member nations have met three times since the Convention's adoption to modify and update it. The first such meeting was held at The Hague in September, 1955.<sup>15</sup> As a result of this meeting, the Hague Protocol was signed,<sup>16</sup> and has been ratified by forty-four nations.<sup>17</sup> The major fault the delegates found in the Warsaw Convention was its low limitation of liability. As a result of this belief, the Hague Protocol embodies a rise in the liability limit to approximately \$16,600<sup>18</sup> and a clarification of the term "wilful misconduct" as used in article 25.<sup>19</sup> The Hague Protocol substitutes "an act or omission . . . done with intent to cause damage or recklessly and with knowledge

7. KREINDLER, *supra* note 3, at § 11.02.

8. Article 20(1) of the Warsaw Convention, *supra* note 1, provides: "The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him . . . to take such measures." KREINDLER, *supra* note 3, at § 11.02.

9. Article 21 of the Warsaw Convention, *supra* note 1, provides: "If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability." KREINDLER, *supra* note 3, at § 11.02.

10. Article 25(1) of the Warsaw Convention, *supra* note 1, provides: "The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct." KREINDLER, *supra* note 3, at § 11.04[1].

11. Warsaw Convention, *supra* note 1, at art. 29(1).

12. 78 CONG. REC. 11, 582 (1934). See Lowenfeld & Mendelsohn, *supra* note 5, at 502 n.18.

13. U.S. CONST. art. VI, cl. 2.

14. For a list of signatories, see KREINDLER, *supra* note 3, at § 11.01[3].

15. KREINDLER, *supra* note 3, at § 12.01.

16. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw, 478 U.N.T.S. 371 (1955) [hereinafter referred to in text and footnotes as the Hague Protocol]. See generally KREINDLER, *supra* note 3, at § 12.01.

17. For a list of signatories, see KREINDLER, *supra* note 3, at § 12.01.

18. See KREINDLER, *supra* note 3, at § 12.02[1].

19. The translation of the phrase "wilful misconduct" from the French "dol" has been questioned by some translators. See KREINDLER, *supra* note 3, at § 11.04[1]. This problem was remedied by the text of the Hague Protocol. *Id.*

that damage would probably result . . ."<sup>20</sup> for the ambiguous term "wilful misconduct" of the original Warsaw Convention.

In spite of the additional terms laid down in the Hague Protocol, the United States was of the opinion that the limitations of liability were too low in light of modern conditions and, on November 15, 1965, the Department of State announced that it would file a formal notice of denunciation of the Warsaw Convention to take effect six months from the date of notice.<sup>21</sup> This proposed denunciation on the part of the western world's foremost aircarrier nation promoted intense negotiations among the other signatories. The Montreal Agreement resulted from those negotiations.<sup>22</sup> Unlike the other instruments modifying the Warsaw Convention, the Montreal Agreement was to be signed by the airlines involved, not by the member nations. By signing the Montreal Agreement, the international air carriers agreed to an increase in liability to a maximum of \$75,000. They further agreed to waive their defenses under article 20(1) of the Warsaw Convention.<sup>23</sup> This resulted, for all practical purposes, in strict liability being imposed on the airlines. However, the defense of contributory negligence of a passenger was retained.<sup>24</sup>

The member nations once again tried to raise the limitation of liability in 1971. The Guatemala Protocol is the result of that effort.<sup>25</sup> The Guatemala Protocol raises the limitation of liability to \$100,000 and incorporates the strict liability features of the Montreal Agreement.<sup>26</sup> The Guatemala Protocol reverts to the original scheme of member nations agreeing to the terms of a new agreement, and the validity of the new protocol is contingent upon ratification by the United States. As of the writing of this article, the United States has not ratified it.<sup>27</sup> No official reason has been advanced by the United

20. KREINDLER, *supra* note 3, at § 12.02[2].

21. Dep't of State Press Release No. 268 (Nov. 15, 1965), 53 Dep't State Bull. 923 (1965). A denunciation is a formal method of indicating a country's intent to withdraw from an international treaty. The mechanics of denunciation are contained in article 39 of the Convention. See also KREINDLER, *supra* note 3, at § 12A.01.

22. Agreement Relating to Liability Limitations of Warsaw Convention and Hague Protocol, approved by C.A.B. Order No. E-23680, May 13, 1966; 31 Fed. Reg. 7302 (1966) [hereinafter referred to in the text as the Montreal Agreement].

23. 31 Fed. Reg. 7302 (1966); *Williams v. Fidelity & Cas. Co.*, 442 F. Supp. 455 (E.D. La. 1977).

24. *Id.*

25. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, I.C.A.O. Doc. No. 8932 (1971) [hereinafter referred to in text as the Guatemala Protocol].

26. See Cousins, *Warsaw Convention—Air Carrier Liability for Passenger Injuries Sustained Within a Terminal*, 45 FORDHAM L. REV. 369, 373 (1976).

27. *Id.* at 373.

States in support of its refusal to ratify the Guatemala Protocol, but an unofficial reason that has been proposed is that the \$100,000 limitation of liability is too low in light of modern conditions.<sup>28</sup> The American Trial Lawyers Association has been most vocal in its opposition to the Guatemala Protocol because of the low limitation of liability.<sup>29</sup> It is also possible that the airlines have put pressure on the government to hold the line at ever-increasing limitations of liability at the Montreal Agreement figures.

The Hague Protocol, as well as the Montreal Agreement and the Guatemala Protocol, modifies the Warsaw Convention in certain respects. These three documents have been adopted by some of the signatories of the Warsaw Convention, but not by all of them. This means that there are five different standards which govern the liability of airlines: local law as defined by applicable conflict of law rules in that flight is not governed by the Warsaw Convention or one of its successor agreements; the Warsaw Convention as originally drafted; or the Warsaw Convention as modified by any of the three subsequent documents. The factors that determine which of the documents govern recovery in the event of an accident are set forth generally in article 1(2) of the Warsaw Convention.<sup>30</sup>

As a result of these four instruments, the potential liability of an airline engaged in international flight may be limited to \$8,300, \$16,600, \$75,000, or \$100,000. If the flight is between two non-signatory nations, the liability may be unlimited. The instrument or instruments that have been ratified by the countries of origin and destination govern the amount of recovery allowable.<sup>31</sup>

28. Hickey, *Breaking the Limit—Liability for Wilful Misconduct Under the Guatemala Protocol*, 42 J. AIR L. COM. 603, 604 n.5 (1976).

29. *Id.* at 604.

30. Article 1(2) provides:

For the purposes of this convention the expression "international transportation" shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

31. *Id.*

## THE PROBLEM

*Limitations of Liability*

The Warsaw Convention and its subsequent instruments specifically limit the damages recoverable from the airlines for injuries sustained as a result of an accident<sup>32</sup> to at most \$100,000. This limitation, however, does not extend to the airplane manufacturers, maintenance crews (if held to be independent contractors), or to the government air traffic controllers or inspectors who certified the airplane as airworthy.<sup>33</sup> Thus, if the airline is found to be ninety-nine percent negligent and the manufacturer one percent negligent, the manufacturer would pay at least \$900,000 of a hypothetical \$1,000,000 judgment while the airline would pay at most \$100,000. At the worst, under the same hypothetical, if the original Warsaw Convention were to govern recoveries, the manufacturer would be forced to pay \$991,700 and the airline only \$8,300. Since the Warsaw Convention supersedes state and federal law in this area, the forum's laws of contribution and indemnification applicable to other tort cases would not govern here as to the airlines. The limitations of the Warsaw Convention would apply to the airlines regardless of state or federal law on point.<sup>34</sup>

These damage limitations present a real and persistent problem for plaintiffs. There are four areas of attack used by plaintiffs' attorneys: (1) the constitutional attack; (2) the employee attack; (3) the wilful misconduct exceptions; and (4) the ticketing attack. The latter two have been successfully used in the United States. The employee attack, while successful in Canada, has been rejected in the United States.<sup>35</sup>

*The Constitutional Attacks*

The Warsaw Convention has been attacked on two constitutional grounds. The first of these, proposed by John J. Kennelly, is that the method of adoption required by the convention itself was not adhered to by the United States and therefore the convention was never properly ratified by the United States.<sup>36</sup> This is an innovative argument, and

32. All injuries sustained while in flight are not accidents as set forth in the Warsaw Convention. If there was no accident, there can be no recovery. *Warshaw v. Trans World Airlines, Inc.*, 442 F. Supp. 400 (E.D. Pa. 1977).

33. Kennelly, *Aviation Law: International Air Travel—A Brief Diagnosis and Prognosis*, 56 CHI. B. REC. 178, 180 (1975) [hereinafter cited as Kennelly].

34. Local law applies as to procedure and substantive law, but limitations of recovery and defenses available to defendants are governed by the Warsaw Convention. C. RHYNE, *AVIATION ACCIDENT LAW* 269-72 (1947).

35. *Reed v. Wiser*, 555 F.2d 1079 (2d Cir.), cert. denied, 434 U.S. 922 (1977).

36. Mr. Kennelly argued that the method of adoption required by the Convention itself was not adhered to by the United States and therefore the Convention was never properly ratified by

one that has a great deal of appeal at first glance. However, the argument has not been adopted by any other writer or by any court of the United States. The wide acceptance of the Warsaw Convention and the number of cases upholding its validity, at least by implication, argue against this theory.

The second and more widely accepted constitutional attack on the Warsaw Convention is a substantive one based on the due process clause. Plaintiffs, it is argued, are deprived of their right to bring an action for their total loss by the limitations of the convention. This argument is based on the proposition that the convention's restriction of liability constitutes a taking of plaintiffs' property in violation of the fifth and fourteenth amendments.<sup>37</sup> In two reported cases, *Garcia v. Pan American Airways*<sup>38</sup> and *Indemnity Insurance Co. of North America v. Pan American Airways*,<sup>39</sup> trial courts summarily rejected the argument of unconstitutionality, holding that it was not for a trial court to hold such an important treaty of the United States unconstitutional. In *Garcia*, a New York trial court rejected plaintiff's constitutional argument, holding:

The power to declare a law unconstitutional should be exercised cautiously by a lower Court and avoided, if possible; and unless it appears clearly, without the slightest doubt, that the law is unconstitutional, it is the better practice for the lower court to assume its constitutionality until the contrary is declared by a Court of Appellate jurisdiction. This policy is especially desirable where the law is of great importance and far-reaching effect; or, if the law has been effective for an appreciable period of time.<sup>40</sup>

The rejection of the plaintiff's arguments, on both the constitutional and public policy grounds, was upheld by the New York Court of Appeals.<sup>41</sup>

In *Indemnity Insurance*, a U.S. district court rejected a similar constitutional attack. An argument was made that under the due process

the United States. He cites the language of the treaty and the fact that President Johnson unilaterally denounced the Convention in 1965. If the Convention were a binding treaty, Mr. Kennelly argues, then a two-thirds vote of the Senate would be required to denounce it. Since this Senate approval was not sought, Mr. Kennelly argues, the Warsaw Convention is not a valid treaty of the United States and is not binding upon its courts. Kennelly, *supra* note 33, at 187-88.

37. "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. V; "nor shall any state deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV, § 1.

38. 183 Misc. 258, 50 N.Y.S.2d 250 (1944), *aff'd per curiam*, 295 N.Y. 852, 67 N.E.2d 257 (1946).

39. 58 F. Supp. 338 (S.D.N.Y. 1944).

40. 183 Misc. 258, 259, 50 N.Y.S.2d 250, 251 (1944).

41. 295 N.Y. 852, 854, 67 N.E.2d 257, 258 (1946).

clause<sup>42</sup> the limitations of the Warsaw Convention constituted an impermissible taking of plaintiff's property without due process of law. The court, analogizing airline cases with workmen's compensation cases<sup>43</sup> and with maritime cases,<sup>44</sup> held that "statutes for the limitation of liability are no novelty."<sup>45</sup>

A third case, *Pierre v. Eastern Airlines*,<sup>46</sup> contains a concise summary of the existing law on the constitutional question raised by various plaintiffs in attempts to circumvent the Warsaw Convention's limitation of liability. The plaintiff there had argued, in addition to the deprivation of property argument raised in *Garcia* and *Indemnity Insurance*, that the Warsaw Convention unconstitutionally deprived him of his right to trial by jury. The court, rejecting this argument as well, stated:

In many instances, such as the limitation of liability in admiralty cases . . . and in construction of various State Workmen's Compensation Acts, it has been held that there was violation of neither the due process clause . . . nor the right to trial by jury . . . of the Amendments to the Constitution. In all such modifications of legal practice, it would seem, analogically at least, that the assessment of damages is not to be considered an exclusive function of the jury.<sup>47</sup>

An argument based on the unconstitutionality of the Warsaw Convention was accepted in only one case, but the decision was subsequently withdrawn by the trial judge. In *Burdell v. Canadian Pacific Airlines, Ltd.*<sup>48</sup> Mr. Kennelly, representing the plaintiff, persuaded Judge Nicholas J. Bua, then of the Circuit Court of Cook County, Illinois, that the damage limitation contained in the Warsaw Convention was unconstitutional. Judge Bua looked to a leading case in admiralty law, *Moragne v. States Marine Lines*,<sup>49</sup> and held that the reasoning there was analogous to *Burdell*. *Moragne* invalidated a statute, not a treaty, on the limitations of liability issue. Judge Bua later withdrew his decision on the constitutional question when the case was settled between the parties.<sup>50</sup> This somewhat vague precedent is relied upon by Mr. Kennelly when he states: "The holdings in *Moragne* . . . eradicate

42. U.S. CONST. amend. XIV, § 1.

43. Specifically, the state of Washington's workmen's compensation statute, WASH. REV. CODE §§ 51.04.010—51.98.050 (1972).

44. Vessel Limitation of Liability Statute, 46 U.S.C. § 183 (1970).

45. 58 F. Supp. 338, 340 (S.D.N.Y. 1944).

46. 152 F. Supp. 486 (D.N.J. 1957).

47. *Id.* at 488.

48. 10 Av. Cas. 18,151 (1st opinion); 11 Av. Cas. 17,351 (2nd opinion). See Kennelly, *supra* note 33, at 196 n.29.

49. 398 U.S. 375 (1970).

50. 11 Av. Cas. 17,351. See Kennelly, *supra* note 33, at 196 n.29.



any constitutional basis for any statute or treaty which would deny a fair recovery for the wrongful killing of a human being."<sup>51</sup>

The constitutional argument must fail in light of the overwhelming precedents in favor of the validity of international treaties.<sup>52</sup> The only qualification is that such a treaty must be made "under the Authority of the United States."<sup>53</sup> This long trend of upholding the treaty-making powers of the executive and legislative branches of government has been said to rest upon the separation of powers doctrine<sup>54</sup> or upon the political question doctrine.<sup>55</sup> Wherever its theoretical base rests, the Warsaw Convention fits squarely within the type of cases decided by the Court and is subject to the rule that treaties of the United States have never been held unconstitutional.<sup>56</sup> In addition, the courts have continuously upheld limitations of liability in state workmen's compensation cases and in federal maritime cases. This, added to the strong, almost irrebuttable, presumption of validity of treaties, argues against the chances of the Warsaw Convention being declared unconstitutional.

### *The Employee Attack*

Several plaintiffs' attorneys have attempted to circumvent the limitations of liability set forth in the Warsaw Convention by seeking recovery directly from the employees of the airline for their own negligence. They have argued that the Warsaw Convention applies only to the airlines themselves, and does not extend to its employees. This method of attack has not been universally successful.<sup>57</sup>

In dictum of a Canadian case, *Stratton v. Trans-Canada Airlines*,<sup>58</sup> the court stated that "[t]here is nothing in the Act<sup>59</sup> that even remotely suggests that the word 'carrier' is to be interpreted as including employees of carriers."<sup>60</sup> The Court of Appeal found that the Warsaw

51. Kennelly, *supra* note 33, at 190.

52. See *Reid v. Covert*, 354 U.S. 1 (1957); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *Missouri v. Holland*, 252 U.S. 416 (1920); *Geofroy v. Riggs*, 133 U.S. 258 (1890).

53. U.S. CONST. art. 6, cl. 2.

54. Haskell, *The Warsaw System and the U.S. Constitution Revisited*, 39 J. AIR L. COM. 483, 493-97 (1973) [hereinafter cited as Haskell].

55. *Id.* at 497-505.

56. *Id.* at 493.

57. See, e.g., Comments, *Carriage by Air Act, 1952—Limitation of Air Carrier's Liability—Whether Servants of Carrier Also Protected*, 41 CAN. B. REV. 124 (1963).

58. 27 D.L.R. 2d 670, 34 W.W.R. 183 (B.C.S.C. 1961), *aff'd in part*, 32 D.L.R. 2d 736, 37 W.W.R. 577 (B.C.C.A. 1962).

59. The Convention for the Unification of Certain Rules Relating to International Carriage by Air, CAN. REV. STAT., ch. 45 (1952). The Carriage by Air Act of 1952 is Canada's implementation of the Warsaw Convention.

60. 27 D.L.R. 2d 670, 674, 34 W.W.R. 183, 187 (B.C.S.C. 1961).

Convention did not apply to the facts of the case, so the court neither affirmed nor overruled the trial court's analysis of the Act.<sup>61</sup> Supporters of this view cite the language of the convention in that articles 17 (carrier liability for personal injuries, etc.), 18 (carrier liability for checked baggage, etc.), 19 (carrier liability for transportation delay), and 22 (maximum liability of the carrier) speak only of the carrier while articles 25 (exception of maximum liability for acts of wilful misconduct) and 20 (general exceptions to carrier liability) specifically include employees as well as carriers.<sup>62</sup> The proponents of this argument say that this duality of language means that the treaty does not extend maximum liability limitations to the employees of the carriers and that recovery may be had from these employees beyond the limits set forth in article 22.<sup>63</sup>

In *Herd & Co. v. Krawill*,<sup>64</sup> a case in many ways similar to *Stratton*, the United States Supreme Court held that the limitations contained in the Carriage of Goods by Sea Act did not apply to the employees of the carrier.<sup>65</sup> This case, read together with the Canadian cases, would seem to be strongly persuasive of the argument that employees of the carrier are not protected by the liability limitations of article 22.

The appellate courts of the United States, however, have not adopted the maritime law-aviation law analogy of the Canadian cases. This analogy, although adopted at the trial court level, was expressly rejected by the Second Circuit in a 1977 case, *Reed v. Wiser*.<sup>66</sup> There, plaintiffs were the representatives of nine passengers killed when a bomb exploded aboard their airliner. While admitting that the Warsaw Convention limited the airline's liability, the plaintiffs sought full recovery from the president of the airline and the vice-president in charge of airline security, alleging that their negligence allowed a bomb to be placed aboard the aircraft, thus causing plaintiffs' loss.

The court in *Reed* examined over thirty cases on point, both foreign and domestic, as well as leading articles on the subject. It included in its examination the Canadian case cited above. The court held that the employees of the airline were clearly within the limitations of liability set forth in the convention, stating: "[A] construction of the lan-

61. 37 D.L.R. 2d 736, 37 W.W.R. 577 (B.C.C.A. 1962).

62. See Comments, *Carriage by Air Act, 1952—Limitation of Air Carrier's Liability—Whether Servants of Carrier Also Protected*, 41 CAN. B. REV. 124, 127-28 (1963).

63. *Id.* at 128.

64. 359 U.S. 297 (1959).

65. *Id.* at 308.

66. 555 F.2d 1079 (2d Cir. 1977).

guage of Article 22(1) and Article 24 which extends the Convention's liability limitation to passenger claims against employees not only reflects the plain meaning and purpose of the French [official] text of these articles but accomplishes all of the Convention's objectives."<sup>67</sup> Rejecting an analogy to *Krawill*, the court summarily dismissed all policy considerations. Recognizing that the convention had been subject to extensive consideration and modification by the executive and legislative branches over its short history, the court concluded: "Our duty is to enforce the Constitution, laws, and treaties of the United States, whatever they might be, and until one of our sister branches declares otherwise, the Warsaw Convention remains the supreme law of the land."<sup>68</sup> The court cited its earlier decision in *Smith v. Canadian Pacific Airways, Ltd.*<sup>69</sup> in support of that part of its decision that held "the Warsaw Convention remains the supreme law of the land,"<sup>70</sup> and that the Warsaw Convention governed the recovery in this case.<sup>71</sup>

*Reed* is the leading case on point in the United States today, the precise issue never having been decided by the Supreme Court. It clearly and unequivocally stands for the proposition that employees of a carrier engaged in international air travel may not be liable in negligence for damages in excess of the limitations of liability set forth in article 22 as modified by subsequent instruments. If one of the employees involved in the accident were to be found guilty of wilful misconduct, article 25 provides that the limitations of liability of article 22 are inapplicable. If the employee were to be found not guilty of wilful misconduct, there is no justifiable policy reason to hold that employee responsible for payment of all such damages over the admittedly low limitations of the Warsaw Convention. To do so would mean that it would be practically impossible to employ or to insure such people.

### *The Wilful Misconduct Exception*

Article 17 of the Warsaw Convention provides a presumption of liability of the carrier for any injury sustained by a passenger, whatever the cause.<sup>72</sup> The limits of the convention apply to such an injury unless,

67. *Id.* at 1092.

68. *Id.* at 1093.

69. 452 F.2d 798 (2d Cir. 1971).

70. 555 F.2d at 1093.

71. *Id.*

72. Article 17 provides:

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger . . . if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

by the terms of article 25, the carrier's actions towards the passenger can be categorized by the court as constituting "wilful misconduct."<sup>73</sup>

This wilful misconduct provision has been most successful in avoiding the limitations of the convention. The leading case, *Froman v. Pan American Airways*,<sup>74</sup> defines wilful misconduct as more than gross negligence. To be outside the limitations of the Warsaw Convention, the conduct of the carrier must be such that "in addition to doing the act in question, the actor must have intended the result that came about or must have launched on such a line of conduct with knowledge of what the consequences probably would be and had gone ahead recklessly despite his knowledge of these conditions."<sup>75</sup> Another court has defined the phrase to mean "the intentional performance of an act in such a manner as to imply reckless disregard of the probable consequences of the performance of the act."<sup>76</sup>

Although the term "reckless" constantly reappears in the courts' attempts to deal with this exception, the definition remains far from fixed and concrete. It must be constantly readjusted to fit the facts of each particular case, and an examination of the facts that have been held to be wilful misconduct is most instructive. Thus, the failure of a pilot to follow air traffic control instructions has been held to be wilful misconduct, but negligent misinterpretation of such instructions would not be.<sup>77</sup> It does not require "a deliberate intention to wreck the airplane,"<sup>78</sup> but it may be as little as "a minor lapse from the accepted standards of safety."<sup>79</sup> It is an objective test, since the pilot will rarely be available for cross-examination as to his subjective intent.<sup>80</sup>

It should be noted that article 25(1) of the Warsaw Convention provides for a local definition of the term "wilful misconduct."<sup>81</sup> Therefore, a uniform result is not required by the treaty from nation to nation, nor even among the various jurisdictions within the United States.<sup>82</sup>

73. Warsaw Convention, *supra* note 1, at art. 25.

74. 284 A.D. 935, 135 N.Y.S.2d 619 (1954), *leave to appeal denied*, 308 N.Y. 1050 (1955), *cert. denied*, 349 U.S. 947 (1955). See KREINDLER, *supra* note 3, at § 11.04[1].

75. Record on Appeal at 452-55. *Froman v. Pan American Airways*, 284 A.D. 935, 135 N.Y.S.2d 619 (1954); KREINDLER, *supra* note 3, at § 11.04[1].

76. Charge to the Jury, *Berner v. United Airlines*, S.D.N.Y. civ. 142-201 (cited in KREINDLER, *supra* note 3, at § 11.04[1]).

77. See generally KREINDLER, *supra* note 3, at § 11.04[1].

78. *Berner v. United Airlines*, S.D.N.Y. civ. 142-201 (cited in KREINDLER, *supra* note 3, at § 11.04[1]).

79. *Id.*

80. KREINDLER, *supra* note 3, at § 11.04[1].

81. Warsaw Convention, *supra* note 1, at art. 25(1).

82. *Id.*

Perhaps the best definition of the term comes from the District of Columbia Circuit Court of Appeals in *KLM Royal Dutch Airline v. Tuller*.<sup>83</sup> The appellate court quoted with approval from the lower court's jury instructions as to the definition of wilful misconduct: "[w]ilful misconduct is the intentional performance of an act with knowledge that the . . . act will probably result in injury or damage, or in some manner as to imply reckless disregard of the consequences of its performance; and likewise, it also means . . . failure to act . . . ."<sup>84</sup> This test is a flexible one, malleable to fit the facts of the case at bar. As such, it is the most susceptible of creative work by plaintiffs' attorneys and provides the greatest latitude to avoid the limitations of liability embodied in the Warsaw Convention.

### *The Ticketing Attack*

One of the more recent areas of attack upon the Warsaw Convention's applicability has been in the area of ticketing.<sup>85</sup> Article 3 of the convention states that a ticket must be given to each passenger.<sup>86</sup> The ticket must contain, among other things, "a statement that the transportation is subject to the rules relating to liability established by this convention."<sup>87</sup> The burden of proving delivery to the passenger is placed on the airlines.<sup>88</sup> Thus, the delivery of "boarding passes" to the passengers of a charter flight has been held not to be in compliance with article 3(2) making inapplicable the limitations of liability of the convention.<sup>89</sup> In a similar case, the New York appellate court reached the opposite result.<sup>90</sup> In the *Froman* case, one of the issues raised was whether Miss Froman had received a ticket as required by the convention. She was on a U.S.O. trip to entertain United States servicemen in Europe when her plane crashed. She saw the ticket placed on the table in front of her, but did not actually take possession of it. An employee of the tour in charge of transportation took possession of it. The court found that by seeing the ticket and then boarding the airplane, Miss Froman had impliedly consented to the contract of carriage as printed on the ticket and thus was within the provisions of the Warsaw Con-

83. 292 F.2d 775 (D.C. Cir.), *cert. denied*, 368 U.S. 921 (1961).

84. *Id.* at 778.

85. Address by John J. Kennelly, Loyola University, October 18, 1977.

86. Warsaw Convention, *supra* note 1, at art. 3(1).

87. Warsaw Convention, *supra* note 1, at art. 3(1)(e).

88. *DeMarines v. KLM Royal Dutch Airlines*, 433 F. Supp. 1047 (E.D. Pa. 1977).

89. Address by John J. Kennelly, Loyola University, October 18, 1977.

90. *Froman v. Pan American Airways*, 284 A.D. 935, 135 N.Y.S. 619 (1954), *leave to appeal denied*, 308 N.Y. 1050 (1955), *cert. denied*, 349 U.S. 947 (1955). See KREINDLER, *supra* note 3, at § 11.05[2].

vention.<sup>91</sup>

Mistakes on the face of the ticket or an improperly drawn ticket will not nullify the convention's applicability.<sup>92</sup> But the requirement of article 3(1)(e) that the ticket must contain "[a] statement that the transportation is subject to the rules relating to liability established by this convention"<sup>93</sup> must be satisfied. Where the ticket's alleged compliance with this requirement began with a sentence several hundred words in length, the court held such a warning ineffective and not in compliance with article 3(1)(e).<sup>94</sup> It did not hurt the plaintiff's case to draw a judge who wore bifocals and who was unable to read the small printing of the ticket.<sup>95</sup> He ruled that the case was not covered by the limitations of liability set forth in the convention.<sup>96</sup> Unintelligibility of the warning has been held to void the effectiveness of any such warning and to expose the carrier to full liability.<sup>97</sup>

This area of attack has been narrowed considerably by the Montreal Agreement, in which the signatory airlines agreed upon a uniform ticket warning that purports to obviate the problems set forth in this section.<sup>98</sup> This area of attack remains open, however, and each case should be examined for both receipt of a ticket containing a warning and for the effectiveness of that warning upon the average passenger.

#### IN SUPPORT OF THE PRESENT SYSTEM

The proponents of the Warsaw Convention set forth four arguments in favor of universal application of the treaty to international airline injury cases.<sup>99</sup> These are, briefly, that the convention keeps the cost of airline travel reasonably low by decreasing insurance costs for the carriers, the uniform rules promulgated by the convention encourage foreign travel, the presumption of fault under the Warsaw Convention and the Montreal Agreement streamlines court procedures, and the convention really does nothing more for the airlines than has

91. *Id.*

92. Warsaw Convention, *supra* note 1, at art. 3(2).

93. Warsaw Convention, *supra* note 1, at art. 3.

94. *Lisi v. Alitalia-Line Aeree Italiane*, 253 F. Supp. 237 (S.D.N.Y.), *aff'd* 370 F.2d 508 (2d Cir. 1966), *aff'd by equally divided Court*, 390 U.S. 455 (1968).

95. The trial judge found the warning to be in "microscopic type," "camouflaged in Liliputian print," "unnoticeable and unreadable." He went on to state that "[t]hey are ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting colors, or anything else. The simple truth is that they are so artfully camouflaged that their presence is concealed." 253 F. Supp. at 243. See also *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965).

96. 253 F. Supp. at 243.

97. KREINDLER, *supra* note 3, at § 11.05[2].

98. C.A.B. Order No. E-23680, May 13, 1966; 31 Fed. Reg. 7302 (1966).

99. See generally Lowenfeld & Mendelsohn, *supra* note 5.

been done for other industries in maritime law and in state workmen's compensation acts.

The first of these arguments, that the airlines are in need of protection from monumental liability claims in order to function, has been cited as one of the initial reasons for the convention's adoption in 1929.<sup>100</sup> The costs of insurance coverage, or of self-insurance, should the limitations of the convention be discarded, they argue, would be prohibitive. These costs would raise the cost of air travel beyond the reach of most people, and, thus, further raise the cost to those few who could still afford it. Those who wish greater coverage than that provided by the convention, they argue, can purchase additional insurance on their own. Low costs to the airlines would mean low costs to the passengers, and thus more people would be able to travel by air. This would, argue the proponents of the convention, further lower the costs of air travel by spreading the fixed costs over more passengers.

These arguments are purely economic. As such, they are persuasive only to the extent they remain economic. When used to justify an exclusion or limitation of liability in a legal or policy sense, they lose much of their appeal. Every commercial venture that sells a product or provides a service must bear the cost of insurance for the benefit of the public. That is as much of a cost of doing business as rent or salaries. No other business enjoys the liability limitations of the Warsaw Convention. Airplane manufacturers have managed to thrive without the benefit of this limitation, in spite of some enormous judgments against them in recent years.<sup>101</sup> There is no sound policy reason to include the airlines within the liability umbrella of the Warsaw Convention in light of this ability of the manufacturers to exist without that coverage.

The second argument is that a unified system is needed to promote international travel by air and the exchange of airline passengers among the signatory nations. This is an admittedly laudable purpose, but it ignores the fact that the treaty specifically provides for the use of local rules of procedure in Warsaw Convention cases and that it is a local definition that will determine the negligence and wilful misconduct provisions of the treaty.<sup>102</sup> The only uniform provision of the treaty that relates to this discussion is the limitation provision. And even that "uniform" provision is not uniform among all the nations

100. *Id.*

101. Address by John J. Kennelly, Loyola University, October 18, 1977. Judgments in domestic aircraft cases have reached over \$5,000,000 for a single injury.

102. Warsaw Convention, *supra* note 1, at arts. 21, 25(1), 28(2).

that have signed one or more of the four instruments governing international air travel. That, standing alone, cannot support an argument that uniformity is achieved by the treaty. The dissimilarities in local rules of procedure and tort law, in addition to the varying recovery limits, clearly undercut the uniformity justification of the convention.

Further, most foreign flag carriers engaged in international air travel are owned by the governments whose flags they fly. Many foreign flag airlines are operated at a loss in order to promote the prestige of that country. A perfect example of this is the enormous losses being incurred by the flights of the Anglo-French Concorde.<sup>103</sup> This joint venture between the French and British government-owned aerospace industries is being flown by Air France and British Airways, each owned by their respective governments. These planes would be flown in international air travel regardless of the costs involved, mainly to justify the government's enormous capital outlay in developing the planes and to enhance the national prestige of the respective nations. These same factors, albeit to a lesser degree, influence the establishment of most foreign flag airlines. The effect on such operations of a rise in the liability limits, or even an abolition of such limits, would be small or nonexistent. There can be no logical justification to hold down insurance or liability costs or to promote more international air travel when the owners of the airlines in question are foreign governments.

The third argument is that absent the Warsaw Convention, the issue of fault would have to be litigated in every case. With the presumption of fault inherent in the Warsaw Convention<sup>104</sup> and in the Montreal Agreement,<sup>105</sup> this often lengthy and difficult factor is taken out of trials and the plaintiff is, therefore, afforded a speedier recovery. While attractive in theory, most aviation accidents are clear as to fault, at least as far as the absence of passenger fault is concerned. The days of airplanes falling out of the sky without fault are long over. Travel by air is by far the safest mode of mass transportation.<sup>106</sup> Absent a passenger placing a bomb aboard the aircraft and then boarding that aircraft, the liability for aviation accidents will probably rest upon the airline, the manufacturer, the maintainer of that airliner, or the federally-operated air traffic control system. The fault may be spread among some or all of these parties, and the presumption of liability of

103. See generally JEPPESEN/SANDERSON, AVIATION YEARBOOK 188-210 (1977).

104. Warsaw Convention, *supra* note 1, at art. 17.

105. C.A.B. Order No. E-23680, May 13, 1966; 31 Fed. Reg. 7302 (1966).

106. A.O.P.A. HANDBOOK FOR PILOTS (1977).



the Warsaw Convention covers only the carrier. Thus, the determination of liability for an aviation accident is usually far from settled. The passenger surrenders his right to recover in excess of a set limit in exchange for an illusory presumption of liability in order to speed his recovery. The argument that the passenger is exchanging a presumption of liability on the one hand for a lower limitation of recoverable damages on the other would seem to be a contract devoid of consideration as far as the plaintiff is concerned.

The most telling arguments brought forth in favor of retaining the liability limits of the Warsaw Convention are the legal ones: *e.g.*, the constitutional arguments and the use of analogies to maritime law and to state workmen's compensation acts. The constitutional issues have already been adequately dealt with for the purposes of this article.<sup>107</sup> The maritime law and compensation act cases are persuasive, but not controlling. Those cases, it must be remembered, deal with state and federal statutes, not treaties of the United States. It is far easier for a court to review the substantive provisions of such a statute for constitutionality than for that court to hold a treaty of the United States unconstitutional. No such treaty has yet been held invalid.<sup>108</sup>

The various state workmen's compensation acts and wrongful death acts are persuasive of the policy favoring an exchange of a new cause of action or a presumption of liability for a set limit of recoveries for damages suffered. To further advance this last argument, however, the proponents should put forth something of greater value to the plaintiffs than what is currently embodied in the Warsaw Convention. The higher limits of the Guatemala Protocol are a step in this direction, but a lessening of the wilful misconduct exception to a gross negligence standard, for example, would go a long way towards quieting the critics of the treaty.

These legal arguments are, charitably phrased, circular. They say, in effect: the treaty is constitutional because it is a valid treaty, and the treaty is valid because it is constitutional. The very real objections, both legal and nonlegal, are drowned in a sea of illogical whirlpools. Many highly competent attorneys have attempted a frontal attack upon the treaty in the courts. All legal arguments have failed. All that is left is the method that worked in 1965. The government must feel compelled to renounce the treaty and to seek a new protocol that is more evenly matched between the competing interests of plaintiffs and the airlines.

107. See text accompanying notes 36-56 *supra*.

108. Haskell, *supra* note 54.

## ARGUMENTS AGAINST THE WARSAW CONVENTION'S LIABILITY LIMITS

The exclusion of other potential defendants, along with the multiple liability limits, are the strongest arguments against the liability limitations of the Warsaw Convention. The protection afforded the carriers is not extended to the manufacturers of airliners,<sup>109</sup> the people who maintain that airliner<sup>110</sup> (if such persons are held to be independent contractors and not employees of the airline), air traffic controllers,<sup>111</sup> or the inspectors who certify the airplane airworthy.<sup>112</sup> Nonetheless, this is a technical distinction for most signatory nations, since all of the above functions are usually performed by the government. In the United States, however, private companies handle all aspects of civil aviation except air traffic control and some airworthiness inspections.<sup>113</sup>

There is no compelling reason for the airlines to enjoy a limitation of liability to a maximum of \$100,000 while the manufacturers and/or maintainers should be liable for millions. The finances of the major airframe manufacturers are certainly no more inherently stable than those of the airlines.<sup>114</sup> If the argument that the passenger is exchanging certain liability for a decreased recovery is valid, there can be no rationale that would justify a refusal to extend these dual provisions to the manufacturer and/or the maintainer.

The problem of multiple liability limits argument is best posited by the use of a hypothetical aviation accident.<sup>115</sup> On a Chicago to New York flight, A is leaving at New York; B is continuing on to London where his trip ends; C is continuing on to Rome from London; and D is finally stopping in Iran. If the plane were to crash between Chicago and New York, A would not be covered by the Warsaw Convention's limitations of liability because he is a domestic passenger. B, C, and D are possibly covered by the convention because they were travelling to another nation. This would be true even if they were to change airplanes or even airlines in New York. B, the London passenger, would

109. KREINDLER, *supra* note 3, at § 11.05[7].

110. *Id.*

111. *Id.*

112. *Id.*

113. See FEDERAL AVIATION REGULATIONS FOR PILOTS §§ 91.169, .217 (1974).

114. Witness the continuing Lockheed Aircraft story and the disappearance of the well-known aviation names into conglomerates such as United Technologies and North American-Rockwell. Even where manufacturers can avoid absorption, they must combine to survive, *i.e.*, McDonnell-Douglas.

115. This example is borrowed, with thanks, from Mr. Kennelly's article. See Kennelly, *supra* note 33, at 176-78.

be limited to a \$75,000 recovery by the Montreal Agreement signed by the British airlines. C, the Rome passenger, would be limited to \$16,600 by the Hague Protocol, the last instrument signed by the Italian Government. D, the Iran passenger, would not be limited by any of these instruments since Iran never signed the Warsaw Convention or its subsequent instruments. There can be no justification for these wide disparities in recoveries based on the same incident.

#### CONCLUSION

No matter how persuasive the political and policy arguments seem, no matter how incongruous and unfair the present treaty might seem, it is clear that all courts that have been called upon to decide the question have found the Warsaw Convention constitutional. The best efforts of plaintiffs who seek to avoid the low restrictions on liability of the convention seem to be directed towards invoking one of the three recognized methods of circumventing the treaty: the wilful misconduct exception, the ticketing/valid warning exception, and the employee/employer exception.

There is a strong and influential cry being raised among aviation lawyers for a modification or renunciation of the Warsaw Convention, either politically or judicially. An increasing number of articles have appeared in recent years in opposition to the low limits of the convention. The rising recoveries in related tort and products liability cases have encouraged these attorneys to seek higher recoveries in airline accident cases. As of this date, these eloquent cries have fallen upon deaf ears in all three branches of government.

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